



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-BC69**

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the Elliot Bay Seawall Project in Seattle, Washington**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of issuance of a Letter of Authorization.

**SUMMARY:** In accordance with regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that a Letter of Authorization (LOA) has been issued to the City of Seattle's Department of Transportation (SDOT) for the take of eight species of marine mammals incidental to pile driving activities associated with the Elliot Bay Seawall Project (EBSP).

**DATES:** Effective for a period of one year from [*insert date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** The LOA and supporting documentation are available for review online at: [www.nmfs.noaa.gov/pr/permits/incidental/construction.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm). Documents cited in this notice may also be viewed, by appointment, during regular business hours at the Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, by telephoning the contact listed below.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Egger, Office of Protected Resources, NMFS, 301-427-8401.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued. Under the MMPA, the term “take” means to harass, hunt, capture, or kill marine mammals. Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the identified species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth in the regulations. NMFS has defined “negligible impact” in 50 CFR 216.103 as “...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”

Regulations governing the taking of harbor seals (*Phoca vitulina richardii*), California sea lions (*Zalophus californianus*), Steller sea lions (*Eumetopias jubatus monteriensis*), harbor porpoise (*Phocoena phocoena vomerina*), Dall’s porpoise (*Phocoenoides dalli dalli*), southern resident and transient killer whales (*Orcinus orca*), gray whales (*Eschrichtius robustus*), and humpback whales (*Megaptera novaeangliae*), by harassment, incidental to pile driving activities in Elliot Bay for the EBSP, were

issued on October 21, 2013, and remain in effect until October 21, 2018. The regulations include mitigation, monitoring, and reporting requirements for the incidental take of marine mammals during pile driving activities associated with the EBSP. For detailed information on this action, please refer to the Federal Register Notice for the regulations at 78 FR 63396 (October 24, 2013).

Pursuant to those regulations, NMFS issued an LOA, effective from October 22, 2013, through October 21, 2014, a second LOA, effective from October 22, 2014, through October 21, 2015, and a third LOA, effective October 22, 2015, through August 31, 2016. SDOT conducted activities as described, implemented the required mitigation methods, and conducted the required monitoring. NMFS announces here that it has issued a fourth LOA, effective for one year, beginning [*insert date of publication in the FEDERAL REGISTER*].

### **Monitoring Reports**

According to prior monitoring reports, no marine mammals entered the Level A harassment zone during the first year of the project (2013-2014 LOA). Two marine mammals entered the Level A harassment zone during the second year (2014-2015 LOA), but work was stopped or not initiated until the animal left the Level A harassment zone. Six killer whales were observed in the Level A harassment zone during the third year of the project (2015-2016 LOA), but pile activity was not occurring at the time. Low-frequency cetaceans (*e.g.*, humpback whales, gray whales) have rarely been observed during the past three years of this project (one humpback in the 2015-2016 LOA and the 2014-2015 LOA). No gray whales have been observed. Low numbers of high- and mid-frequency cetaceans (*e.g.*, harbor porpoise and killer whales, respectively)

have been observed within the Level A harassment zone, but only one animal of each species was documented as take (Level B harassment) during the 2015-2016 LOA, significantly below the maximum number of takes authorized per year (40 and 315, respectively). There were no observed takes of harbor porpoises or killer whales in the 2014-2015 LOA or the 2013-2014 LOA.

Pinnipeds are more likely to be present in the construction area and to approach more closely. However, California sea lions (the pinniped species with the most documented takes), rested on the mooring buoys during construction and throughout the entire monitoring period on most days. These mooring buoys are well outside the SDOT's Level A harassment zones (under NMFS' then-current thresholds) for all pinnipeds and occur approximately two miles from these zones. The total number of potentially harassed marine mammals was well below the authorized limits, with the exception of the California sea lion in the 2014-2015 LOA (Year 2 LOA). The reported take for California sea lions for the Year 2 LOA by Level B harassment only, exceeded the annually authorized level, and slightly exceeded the authorized level in the Year 1 LOA, but not in the 2015-2016 LOA (Year 3 LOA). Please see the monitoring reports at <http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm> for more detail. The exceeded take in the Year 2 LOA resulted in part because of an error in our assumptions relating to the proposed take estimates in the rule, *i.e.*, the number of California sea lions regularly hauling out on buoys in Elliot Bay.

## **Analysis**

Based on our review of monitoring to date, we revised take estimates by assuming an estimated daily exposure of up to seven California sea lions (as compared with five assumed in regulations).

This revised estimate of take constitutes 0.14 percent of the population of California sea lions, which is 0.09 percent greater than the estimated take in the rule, and is the same kind of take anticipated in the regulations. Accordingly, the anticipated taking remains consistent with the basis for our final rule determinations of negligible impact based on the total taking and of small numbers, and our subsistence findings for the specified activity.

### **Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing**

In August 2016, NMFS released its Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Guidance), which established new thresholds for predicting auditory injury, which equates to Level A harassment under the MMPA. In the August 4, 2016, **Federal Register** notice announcing the Guidance (81 FR 51694), NMFS explained the approach it would take during a transition period, wherein we balance the need to consider this new best available science with the fact that some applicants have already committed time and resources to the development of acoustic analyses based on our previous thresholds and have constraints that preclude the recalculation of take estimates, as well as consideration of where the agency is in the decision-making pipeline. In that notice, we included a non-exhaustive list of factors that would inform the most appropriate approach for considering the new Guidance, including: how far in the MMPA process the applicant has progressed; the scope of the

effects; when the authorization is needed; the cost and complexity of the analysis; and the degree to which the Guidance is expected to affect our analysis.

In this case, SDOT submitted a timely request for an LOA that was determined to be adequate and complete prior to availability of the Guidance and indicated that they would need to receive their fourth (final) LOA (if issued) by fall 2016. The incidental take rule for SDOT's activities considered the potential for auditory injury to marine mammals, and concluded that injury would be unlikely to occur due to SDOT's mitigation measures and SDOT's observed success of those measures as implemented previously. As described in the preamble of the regulations (78 FR 63396), the SDOT calculated Level A harassment and the Level A harassment mitigation zones on the basis of NMFS' then-current thresholds for onset of P (*i.e.*, 180/190 dB rms) (PTS).

Following release of the Guidance, we considered the updated thresholds and found that the distances at which animals might be exposed to injury fall mostly within the mitigation zones, and therefore the likelihood of auditory injury of marine mammals is still low. However, to further reduce the likelihood in light of the Guidance, the SDOT will now implement a 61 meter (m) exclusion zone for high frequency cetaceans and a 25 m exclusion zone for pinnipeds (inclusive of both phocids and otariids) during vibratory pile driving, which is larger than the PTS isopleth indicated by the Guidance for otariids. As an addition to their monitoring plan, the SDOT will use Internet sites that track whale activity in Puget Sound prior to and during monitoring shifts in anticipation of any cetacean that may enter the Level A/B harassment zones. In summary, we have considered the new Guidance and believe that the likelihood of injury is adequately addressed in the analysis and appropriate protective measures are in place in the LOA.

## **Authorization**

NMFS has issued an LOA to SDOT authorizing the Level B harassment of marine mammals incidental to pile driving activities associated with the EBSP at Seattle, WA. Take of marine mammals will be minimized through implementation of the following mitigation measures: (1) limited impact pile driving; (2) containment of impact pile driving; (3) additional sound attenuation measures; (4) ramp-up of pile-related activities; (5) marine mammal exclusion zones; and (6) shutdown and delay procedures. SDOT will also conduct visual monitoring and underwater acoustic monitoring for mitigation and research purposes. Reports will be submitted to NMFS at the time of request for a renewal of the LOA, and a final comprehensive report, which will summarize all previous reports and assess cumulative impacts, will be submitted before the rule expires.

Issuance of this LOA takes into consideration the results of the monitoring reports as well as NMFS' Guidance on hearing impacts from anthropogenic acoustic sources. Based on that information and the information discussed in the rule making for the five-year regulations, the activities described under the LOA and the level of anticipated taking is consistent with the findings made for the total taking allowable under the

regulations, the project activities will have a negligible impact on the affected marine mammal species or stocks and will not have an unmitigable adverse impact on their availability for subsistence uses).

Dated: November 9, 2016.

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Donna S. Wieting

Director,

Office of Protected Resources,

National Marine Fisheries Service.

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